

U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

Telephone: (513) 684-3252
Facsimile: (513) 684-6108



Date Issued: March 18, 1999

Case No: 1998-LHC-950

In the Matter of

JEFFREY LEE MARTIN

Claimant

v.

MC GINNIS, INC.

Employer

FRANK GATES ACCLAIM

Carrier

and

Director, Office of Workers' Compensation Programs

Party-in-Interest

APPEARANCES:

Steven C. Schletker, Esq. and Mary E. Ray, Esq.
Schletker, Hornbeck & Moore
Covington, Kentucky
For Claimant

Todd M. Powers, Esq.
Schroeder, Maundrell, Barbieri & Powers
Cincinnati, Ohio
For the Employer

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER — AWARDING BENEFITS

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. The case was referred to the Office of Administrative Law Judges on January 22, 1998. (ALJX 5).

Following proper notice to all parties, a formal hearing was held on September 29, 1998, in Cincinnati, Ohio. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been carefully reviewed and thoughtfully considered. References to "ALJX", "CX", "EX", and "JX" refer to the Administrative Law Judge Exhibits, Claimant Exhibits, Employer Exhibits, and Joint Exhibits, respectively. The transcript of the hearing is cited "Tr." and by page number¹.

ISSUES

The case presents the following issues²:

1. The nature and extent of Claimant's injury.
2. Whether Claimant is entitled to temporary total, permanent partial, or permanent total disability benefits.
3. The date of maximum medical improvement.

¹After the hearing, the parties submitted two additional joint exhibits which made corrections to JX 1. The first changed the amount of Claimant's total compensation between February 6, 1996 and January 22, 1997 to \$23,528.38 and the second changed the amount of temporary total disability paid to Claimant by Ohio Workers' Compensation to \$24,668.49. These additional joint exhibits are received into evidence as JX 2 and JX 3, respectively.

²On the Joint Stipulation (JX 1), the parties indicated that causation was disputed. In the section of the stipulation where the parties are to list the issues, however, they did not list causation as an issue. Similarly, when I asked the parties to identify the issues at the hearing, they did not mention causation. Neither of the parties addressed causation as an issue in their briefs. I do not consider causation as being an issue in this case.

4. Whether the employer's payment to Claimant of Ohio Workers' Compensation satisfies its obligation to compensate Claimant under the Longshore Act for temporary total, permanent partial, or permanent total disability³. (JX 1 and Tr. 16-18).

FINDINGS OF FACT

Background

Jeffrey Martin testified at the hearing on September 29, 1998 and by deposition on September 24, 1998. He is a thirty-eight year old longshoreman and a high school graduate. (Tr. 20-1). After graduating in 1978, he worked as a laborer and entered an apprenticeship as a machinist. (Tr. 21). In 1981, he went to work for McGinnis, Inc. (hereinafter McGinnis). (Tr. 21). He was hired as a machinist and kept this position throughout the course of his employment, working his way up to the point where he was a lead man in the shop. (Tr. 21-2). His supervisor at work was his father, with whom he does not get along. (Tr. 62-3). He performed river repair work on tugboats and barges. His job required him to climb ladders with tools, use heavy equipment, crawl in confined spaces, repair hydraulics in confined spaces, kneel, stoop, and use sledgehammers, chain falls, and come-alongs. (Tr. 22). He was required to engage in lifting every day items ranging from ten to a few hundred pounds. (Tr. 23). He was generally very healthy until September, 1995 and intended to work for McGinnis until retirement. (Tr. 25-6).

On September 6, 1995, Claimant was assigned to remove the rudder from a dry docked boat, take it to the machine shop, and do repair work on the rudder shaft. (Tr. 26). He was working by himself when a sling broke and a 150 pound shaft fell two feet, pinning the back of his left hand and wrist to a table. (Tr. 26-7). He used his right hand to push the shaft off of his left hand. Immediately thereafter, he became nauseous and noticed that his hand was swelling. (Tr. 27). After discussing what had happened with a supervisor, Claimant went to the emergency room at St. Mary's Hospital to seek treatment. (Tr. 28). He was treated and released, but didn't return to work for five weeks. (Tr. 28).

St. Mary's Hospital referred Claimant to Dr. Bolano Scott's Orthopedic Center. (Tr. 28). He was in physical therapy for six

³The Claimant has conceded that Employer will be entitled to a credit for benefits paid under Ohio Workers' Compensation if he is awarded benefits under the Act. (Claimant's brief at 45). Thus the parties are in agreement as to the disposition of this issue.

months and attended therapy sessions twice a week in addition to home therapy. (EX 14 at 23 and 29). During this period of time, Claimant had pain in his hand and wrist and burning, together with shooting sensations up through his forearm. (Tr. 29). He returned to work on October 23, 1995, but was released to perform light duty clerical work only. (Tr. 30). Even while sitting at a desk, he experienced pain in his hand at all times. (Tr. 30). Claimant was not allowed to take his prescribed pain medication while working at McGinnis. (Tr. 31). His left hand and wrist continued to cause him pain and the burning sensation progressed into his shoulder and shoulder blade. (Tr. 32). Claimant was sent to work on the floor, but couldn't tolerate it. (Tr. 32).

On December 12, 1995 Claimant's hand became swollen and very painful while he was working. (Tr. 32). He visited Dr. Bolano the next day, who told him to stop working. (Tr. 33). Claimant was off work for two months before he again attempted to return. (Tr. 33). This time approximately seventy percent of his work was clerical and thirty percent was on the floor taking inventory and performing work that required using his hands. (Tr. 34). Although Claimant is right handed, his left hand continued to bother him a great deal. (Tr. 34, 59). At this point, Claimant's back and the base of his neck caused him pain as well. (Tr. 34, 59). He continued physical therapy, but was in pain even when he did sedentary work. (Tr. 34).

On January 21, 1997, Claimant again stopped work at McGinnis. (Tr. 36). His arm began to deteriorate. His symptoms included open sores with infection, loss of hair on the back of his hand, and brittle nails. (Tr. 36). He began treating with Dr. Adel Ibrahim in 1997 who treated him with painful injections in his spine. (Tr. 38). Each injection only provided him with about four and a half hours of pain relief. (Tr. 39). In April, 1998, Claimant had a spinal cord stimulator surgically implanted in his back. (Tr. 39-40). Although the stimulator has reduced his pain somewhat, Claimant still must take medication in the mornings and evenings. (Tr. 42). Since the insertion of the stimulator, Claimant's nails are no longer brittle and the sores on his arm are healing, but his hand is still swollen and discolored. (Tr. 43, 66). At the hearing, I observed inflammation and discoloration in the area immediately behind his fingers. (Tr. 43). He still has pain in his left wrist, arm, shoulder, lower neck, and back. (Tr. 44).

Claimant does not believe that he is capable of resuming his job as a machinist. (Tr. 56). He has looked for a variety of work, but does not think that he can maintain a position in the long term due to his pain, the medications he must take, and the spinal stimulator he uses. (Tr. 46). The spinal stimulator involves the use of a powerful magnet that can delete diskettes and credit cards and set off alarm systems. (Tr. 57). He has deleted three of his own ATM cards. (Tr. 58). He takes medications at

7:00 a.m., 11:00 a.m., 7:00 p.m., and 11:00 p.m. (EX 14 at 31). The medication makes him drowsy and he doesn't drive while it's in his system. (Tr. 83; EX 14 at 41). Claimant also investigated furthering his education, but concluded that he can't afford it. (Tr. 46).

Claimant can close his left hand somewhat, but cannot make a fist. He can raise his left arm a little above shoulder level, but not all the way up. (Tr. 51). He can engage in light lifting and drive a bit with his left arm, but is limited. (Tr. 51, 55). The doctors have told him to try and use the arm when possible as a means of therapy. (EX 14 at 27). He does not believe that he is capable of resuming his job as a machinist. (Tr. 56).

I find Jeffrey Martin to have been an entirely credible witness.

Terri Martin, Claimant's wife, testified at the hearing as well. (Tr. 88). She has been married to Claimant for seventeen years. (Tr. 88). Prior to the accident of September 6, 1995, she testified that Claimant was generally healthy, active, and outgoing. (Tr. 88). He performed home repairs, played softball, hunted, and played golf. (Tr. 88-9). He did not have any complaints about his left hand, arm, shoulder, neck, or back. (Tr. 89). Following the accident, Mrs. Martin observed that Claimant experienced a great deal of swelling, developed lesions, and slept restlessly. (Tr. 90).

I find Terri Martin to have been entirely credible.

Mitchell Joe Musser, one of Claimant's fellow machinists at McGinnis, also testified at the hearing. (Tr. 97-8). He testified that Claimant's job at McGinnis involved heavy lifting, climbing, and overhead work. (Tr. 99). He did not observe Claimant having any difficulty with his left hand, arm, or shoulder prior to the accident. (Tr. 100). At the time of the accident, Mr. Musser was working five or six feet away from the Claimant and saw his swollen hand immediately after the shaft fell on it. (Tr. 101). Mr. Musser told the Claimant that he should go to the emergency room immediately. (Tr. 103). When Claimant returned to work, Mr. Musser observed that he only used his left hand when necessary. (Tr. 105).

I find Mitchell Joe Musser to have been entirely credible.

The deposition of Carl Ray Haney was taken on September 25, 1998. (EX 12). Mr. Haney is a machinist at McGinnis who worked in the same general area as Claimant. (EX 12 at 5-6). He testified that the machinists usually do not lift more than forty pounds by themselves. (EX 12 at 8). Laborers assist in carrying heavy items. (EX 12 at 22). The men now have cranes, which they did not have at the time Claimant was injured. (EX 12 at 8). They move

things on a daily basis, stand for prolonged periods of time, climb ladders, work in confined spaces, and must crawl or lay down to work. (EX 12 at 11-4). He testified that it is necessary to be in good physical condition to work as a machinist. (EX 12 at 15). He never knew Claimant to have any problem with his left hand, arm, back, or shoulder prior to the accident. (EX 12 at 15). Immediately after the accident, Claimant's hand looked swollen and two months prior to the deposition, Claimant's hand was still swollen. (EX 12 at 18 and 21).

The deposition of Steve Wilcox was taken on September 25, 1998. (EX 13). He is one of the lead men at McGinnis. (EX 13 at 5). He testified that heavy lifting is done with a crane and that he does not have to lift over 20 pounds. (EX 13 at 5, 7). He stated that rudder bearings are lifted with the assistance of cranes and that the machinists work together to lift hydraulic cylinders. (EX 13 at 10). Machinists work in confined areas and must sometimes work while crouching or laying down. (EX 13 at 10-11). They also must climb ladders and stand on their feet for a number of hours. (EX 13 at 11). Prior to the accident, Mr. Wilcox testified that Claimant was a strong, able-bodied worker who didn't have any problem with his left hand, arm, shoulder, or back. (EX 13 at 13). On the day of the accident, Claimant's hand looked swollen. (EX 13 at 14). When Claimant returned to work, Mr. Wilcox thought that he was making an effort to perform his duties in the shop. (EX 13 at 16).

Surveillance

There is a report from Tracker Investigations, Inc. dated September 22, 1996. (EX 10). The investigator found that Claimant had claimed no restrictions on his South Carolina driver's license and no restriction was observed at the time he applied. Claimant was observed performing activities such as adjusting his clothing, closing a van door, and steering with his left hand. (EX 10 at 3).

I have viewed the surveillance video. (EX 9). It portrays Claimant moving plants, steering a van, holding papers, adjusting his clothes, opening van doors, carrying groceries, unfolding a table, and performing other light duties using his left hand. The video did not have a close enough view to show whether Claimant's hand was swollen. I also note that the surveillance video would not be able to demonstrate whether Claimant was drowsy or in pain.

Medical Evidence

Claimant was diagnosed with a contusion to his left hand at St. Mary's Hospital on September 6, 1995. (CX A). An x-ray read by Paul R. Capito revealed no identifiable fracture or other acute bone abnormality, but he cautioned that a small nondisplaced fracture may not have been visualized. Claimant was treated and released in good condition. On December 3, 1996, Dr. William

Sheils read a bone scan to indicate suspected tenosynovitis or some other inflammatory process involving the soft tissues about the wrist. He saw nothing to suggest a stress fracture. The qualifications of Paul Capito and Dr. Sheils are not in the record.

Dr. Luis A. Bolano examined Claimant on September 11, 1995. (CX B). Dr. Bolano's impression was that Claimant sustained a significant contusion to the left hand. He recommended immobilization in a short arm cast, but cautioned that Claimant would probably not be able to work while in the cast and may require additional time after the cast is removed. (CX B at 1). On October 2, 1995, Dr. Bolano found that Claimant was still having moderate discomfort although his swelling was much improved. He found Claimant to be able to make a full fist to the palm with full extension. Dr. Bolano noted that Claimant experienced pain with any wrist motion, although he was able to demonstrate about a 40 degree arc of motion of the wrist. He recommended additional rest and therapy and estimated that Claimant could return to work in four to six weeks. (CX B at 3).

On October 30, 1995, Dr. Bolano noted that Mr. Martin reported being able to grip 160 pounds on the right as opposed to twenty pounds on the left. He found that Claimant persisted with significant weakness. He observed moderate swelling over the dorsum of the hand. At this point Claimant had been back to work at light duty for a week. Dr. Bolano recommended that Claimant continue at light duty for at least another four to five weeks. (CX B at 5).

On November 27, 1995, Dr. Bolano observed that Claimant continued with pain and weakness over the dorsum of the hand and that the physical therapist reported slow progress. He stated that Claimant should attempt to perform his previous work for an hour a day until his tolerance increased. (CX B at 7).

There is a letter from Dr. Kyle R. Hegg to Dr. Bolano dated December 12, 1995 reporting that Mrs. Martin had called to report that Mr. Martin's hand was much more swollen than average after a minimal amount of work. (CX B at 8). On December 13, 1995, Dr. Bolano reported that Claimant was experiencing significant discomfort with his hand that coincided with the return to his regular work. Dr. Bolano stated that Claimant was making slow progress, but that it appeared that it would take longer than usual for him to recover. He recommended that Claimant take off work for rest and home therapy. (CX B at 9).

On January 15, 1996, Dr. Bolano observed that Claimant had made some improvement after taking several weeks off of work. In two to three weeks, he said that the Claimant would be allowed to return to his light duty assignment and begin a graduated return to his previous occupation. (CX B at 12). On February 12, 1996, he observed that Claimant had definitely improved, but was unable to

return to his job. (CX B at 14). On April 1, 1996, he found that Claimant was tolerating his light duty work. He anticipated that Claimant would improve more rapidly over the next six to eight months. (CX B at 15). On May 30, 1996, he found that Claimant's injury was improving slowly, but that he still had pain and swelling over the dorsum of the hand. He recommended that Claimant stay at his light duty work as long as possible and predicted that Claimant would reach maximum medical improvement in about three months. (CX B at 16).

On August 22, 1996, Dr. Bolano found that Claimant continued to have left hand discomfort. (CX B at 19). He observed that a functional capacity evaluation conducted that day revealed decreased left hand strength and range of motion, decreased wrist range of motion, decreased lifting tolerance, and increased subjective reports of pain. He found Claimant's symptoms hard to explain and the diagnosis unclear. He stated that Claimant had symptoms of reflex sympathetic dystrophy (hereinafter RSD) and that it was also possible that Claimant had experienced a stress fracture of occult intra-articular wrist pathology which was responsible for the generalized dorsal hand pain. A left hand technicum scan was requested. Dr. Bolano recommended that Claimant continue his sedentary office work since it appeared to be tolerable. (CX B at 20). The bone scan interpretation was not compatible with RSD. Dr. Bolano noted persistent swelling of the dorsum of the hand with diffuse milder pain throughout the wrist and occasional radiating symptoms in the forearm. He opined that Claimant may have some component of RSD despite the inconsistent bone scan. He stated that Claimant has a chronic pain syndrome, possibly due to sprain of the CMC joints and recommended that Claimant see Dr. Ozturk for consideration of sympathetic blocks. (CX B at 22). Dr. Bolano's qualifications are not in the record.

Dr. Sisir K. Bhattacharyya examined Claimant on December 16, 1996. (CX C). He observed that Claimant sustained damage to the ligaments, tendons, and nerves from his crushing injury at work. He opined that Claimant has probably developed sympathetic dystrophy and that he had reached maximum medical improvement. He found Claimant's condition to be permanent and said that the period of restriction in his employment was uncertain. Dr. Bhattacharyya is a diplomate of the American Board of Orthopaedic Surgery.

Dr. Adel A. Ibrahim examined Claimant on December 23, 1996. He observed swelling in Claimant's left hand. (CX D). On January 30, 1997, he opined that Claimant had not reached maximum medical improvement. He stated that after a nerve block, Claimant's hand may be saved, but that damage to the hand and wrist was permanent and would prevent any type of heavy labor. (CX D at 2).

On February 10, 1997, Dr. Ibrahim opined that Claimant had developed RSD in his left arm due to the crush injury of his left hand and wrist. His symptoms were pain, swelling, stiffness, and

cold sensitivity in his arm and hand. Dr. Ibrahim found very limited use of Claimant's left arm with decreased motion in his left wrist, no grip in his left hand, and limited flexibility in his left elbow and shoulder. He advised Claimant that RSD could lead to amputation of the affected arm. He opined that Claimant would not regain 100% use of his arm and should start looking for an alternative occupation. (CX D at 5).

On May 5, 1997, Dr. Ibrahim noted that Mr. Martin had undergone a course of nerve blocks with practically no improvement. He stated that Claimant had problems with his shoulder due to pain and limitation in pronation and abduction. He found Claimant to be 100% disabled. (CX D at 7).

On December 12, 1997, Dr. Ibrahim opined that Claimant's left upper extremity was completely disabled. He stated that Claimant could not return to his heavy manual labor job because of his arm problems. (CX D at 13). Also on December 12, 1997, Dr. Ibrahim completed a U.S. Department of Labor work restriction evaluation. He opined that Claimant was incapable of lifting or climbing, but could still sit, walk, bend, squat, kneel, twist, and stand. He found his ability to lift limited to zero to ten pounds and found restrictions in simple grasping, pushing, pulling, and fine manipulation. He stated that Claimant could not reach above his shoulder or operate a car, truck, crane, tractor, or other motor vehicle. He marked boxes indicating that Claimant could work eight hours a day and needed vocational training. He also marked a box indicating that Claimant had reached maximum medical improvement, but did not state when this happened. (CX D at 14).

On March 17, 1998, Dr. Ibrahim observed that Claimant had experienced a significant progression of disease. He observed atrophy of the left forearm, skin breakdown, discoloration of the hand, wrist, and forearm, pain, and edema. He also found gynecomastia of the right breast due to the medications to treat RSD. Dr. Ibrahim opined that Claimant was physically unable to perform any employment due to the loss of use of his left arm radiating into the shoulder and back, compounded by the pain management required by RSD. (CX D at 17).

On August 24, 1998, Dr. Ibrahim opined that Claimant had developed herpes Zoster as a consequence of sympathetic dystrophy of his left upper extremity. Some improvement was noted following a nerve block and insertion of a nerve stimulator. He stated that although Claimant had no muscle wasting, he still had a significant limitation of motion in the hand joints. Dr. Ibrahim was hopeful that Claimant would improve with extensive physical therapy. He opined that maximum medical improvement would not occur for a year or two. (CX D at 19).

Dr. Ibrahim was deposed on April 7, 1998. (CX N). He was trained in hand surgery for six months in the residency program at

Jefferson University. (CX N at 5). He is Board Certified in General Surgery. (CX N at 6). Upon examination of Claimant, Dr. Ibrahim found severe limitation of hand movement at all joint levels. (CX N at 8). He testified that RSD is a very common problem following an injury to the hand like Claimant's and that it can lead to amputation of the arm. (CX N at 9-10). He testified that Claimant was unemployable due to his severe pain and the necessity that he take pain medications. He testified that this state was brought on by RSD, which was caused by the September 6, 1995 crush injury at work. (CX N at 17). Dr. Ibrahim opined that Claimant had been totally disabled up to the date of the deposition and probably would be for another year, noting that RSD is treatable, but that Mr. Martin was 100 percent incapacitated. (CX N at 19). Dr. Ibrahim opined that Claimant was nowhere near maximum medical improvement, but offered that Dr. Ozturk would be more qualified to prescribe a course of treatment. (CX N at 20). He felt that Claimant's case of herpes zoster was related to RSD, but he was not certain. (CX N at 22). He testified that Claimant's shoulder limitation and pain were definitely related to RSD. (CX N at 24).

Dr. Ibrahim was again deposed on October 7, 1998. (EX 17). He testified that the bone scan and MRI were just taken to make sure that no injury was missed, not to diagnose RSD. (EX 17 at 10). He said that the diagnosis of RSD was based on Claimant's description of pain, limitations of movement, swelling, and discoloration. (EX 17 at 12). He opined that Dr. Kleinert could not have determined whether Claimant had any atrophy due to the swelling in Claimant's hand and arm. (EX 17 at 17). He stated that the discoloration in Claimant's hand and the swelling in his hand and arm indicated that the injuries were not fictitious. (EX 17 at 21). Dr. Ibrahim stated that it was an accident when he marked on the U.S. Department of Labor work restriction evaluation form that Claimant could work eight hours a day and had reached maximum medical improvement. (EX 17 at 25). He opined that Claimant was guarding with his arm on the surveillance video, but not as much on the later tapes. (EX 17 at 27-8). Dr. Ibrahim stated that when he opined that Claimant had no use of his arm that he meant to imply that pain had rendered it useless. (EX 17 at 28). He opined that Claimant was in too much pain to work and that he was still trying to reach maximum recovery. (EX 17 at 31). He also stated that Claimant had suffered psychologically from his experience. (EX 17 at 45).

Dr. Ibrahim stated that he was unsure whether Claimant's herpes zoster would have been related to the trauma to his left hand, but he would assume that it was. (EX 17 at 33). Regardless, he stated that Claimant's pain and swelling is unrelated to herpes zoster. (EX 17 at 34). He also opined that Claimant has not reached maximum medical improvement and that there is no question that Claimant's wrist, elbow, and shoulder symptoms are related to his workplace injury. (Ex 17 at 36-9).

Dr. Alan Cochran conducted an MRI of the upper extremity joint on January 9, 1997. (CX E). His impression was a normal MR of the left wrist and hand with no abnormal signal intensity to correlate with the clinical suspicion of RSD. Dr. Cochran's qualifications are not in the record.

Kathy Clagg, a registered nurse and pain management coordinator at Cabell Huntington Pain Management Center, took a patient history and pain assessment of Claimant on January 15, 1997. (CX F). She noted that Claimant complained of constant throbbing pain in his left hand and wrist, radiating up his lower arm. Wrist and hand motion were limited. She noted obvious swelling in the left hand and pain with light pressure. Ms. Clagg observed a greenish discoloration between Claimant's fingers. Claimant reported to her that he had to cut back considerably on coaching children's sports and that playing golf caused him extreme pain. He also reported irritability and difficulty sleeping. (CX F at 1-4).

Dr. Ahmet Ozturk examined Claimant on January 17, 1997. He observed obvious edema in Claimant's left hand. Claimant's skin was hypersensitive, hyperalgesic, and allodynic. He also observed increased rate of nail growth and some loss of skin hair. Ranges of motion in the fingers and wrist were found to be very limited. Dr. Ozturk also noted some restriction in elbow and shoulder movements. He recommended a series of stellate ganglion blocks. (CX F at 5). Stellate ganglion blocks were performed on March 14, 1997; March 18, 1997; and April 8, 1997. (CX F at 6). On July 10, 1997, Dr. Ozturk noted that Claimant had improved to some degree. Dr. Ozturk was not satisfied with the level of improvement however and requested authorization for more stellate ganglion blocks and physical therapy. (CX F at 9). A stellate ganglion block was performed on September 11, 1997. (CX F at 10).

Also on September 11, 1997, Ernest D. Brewer, a physical therapist, conducted an initial evaluation of Claimant. (CX F at 11). Mr. Brewer observed that Claimant experienced mild improvement with the nerve block. He found Claimant's left upper extremity to be moderately to significantly hypersensitive to tactile sensation. He stated that although Claimant was cooperative, he was significantly limited by pain in his left upper extremity. Mr. Brewer recommended a home exercise program. (CX F at 11).

On September 18, 1997, Mr. Brewer stated that Claimant had noted a significant increase in left shoulder pain over the preceding three days. He found no increased tolerance to activity despite the sympathetic block. (CX F at 14). On November 25, 1997, another stellate ganglion block was administered. (CX F at 15). On the same day, Mr. Brewer stated that Claimant was experiencing significantly decreased levels of pain. Mr. Brewer found that Claimant responded remarkably well to the sympathetic

block. (CX F at 16). Another stellate ganglion block was administered on October 16, 1997. Mr. Brewer noted that Claimant experienced a significant level of increased pain twenty four hours following his last treatment and that the pain persisted for three days. Claimant continued his home exercise program. Mr. Brewer observed that Claimant had a high level of motivation and that Claimant initiated a conversation about increasing his overall activity level. Mr. Brewer advised him to start participating in social activities and trying to swing a golf club with his right upper extremity only. (CX F at 18).

On January 9, 1998, Dr. Ozturk diagnosed complex regional pain syndrome (hereinafter CRPS), type I, in the left arm. (CX F at 20). Claimant and Dr. Ozturk discussed therapy options which included continuing with the current course of treatment, repeating a series of stellate ganglion blocks, conducting a permanent lesion of the stellate ganglion, using a Bier block with sympatholytic substances, using a cervical spine cord stimulator, or getting an opinion from Dr. Stanton Hicks, a well-known authority on CRPS. (CX F at 20).

On March 4, 1998, Dr. Ozturk noted that Claimant was complaining of increased pain and symptoms. He observed significant edema at the hand and skin breakdown due to poor circulation. The extremity was found to be cold and extremely tender. Dr. Ozturk opined that Claimant's symptomatology had progressed significantly. He recommended a spinal cord stimulator and stellate ganglion blocks. (CX F at 21).

On March 5, 1998, Mr. Brewer stated that he was very concerned about the edema in Claimant's left upper extremity and the number of sores that were developing. He opined that Claimant was at great risk for further injury due to ulcerations and possible infection and was frustrated that there was not authorization to treat the Claimant effectively. (CX F at 23).

On April 28, 1998 and May 6, 1998, Dr. Ozturk surgically implanted a spinal cord stimulator. (CX F at 25-6). On May 13, 1998, Claimant returned for follow-up treatment. Good stimulation to the affected extremity was found. (CX F at 27). On June 3, 1998, Mr. Brewer noted that claimant had experienced dramatic improvement in pain and some decreased edema since the spinal cord stimulator implant. He continued to have moderate levels of pain and edema of the left upper extremity. Claimant stated that he cannot sit or stand for greater than 30 minutes since the stimulator was inserted. (CX F at 29). On June 3, 1998, Dr. Ozturk opined that Claimant was doing reasonably well after the spinal cord insertion. Claimant complained of a burning sensation between the shoulder blades. (CX F at 30).

The deposition of Dr. Ozturk was taken on April 7, 1998. (CX N). Dr. Ozturk is the medical director of the pain center in the

Cabell Huntington Hospital. (CX N at 4). He is Board Certified in Anesthesiology and Pain Management. (CX N at 6). He testified that he sees approximately 50 to 100 patients per year for RSD. (CX N at 7). In examining Claimant, he recognized pathognomonic signs of RSD. (CX N at 9). He suggested immediate treatment with stellate ganglion blocks. (CX N at 10). Stellate ganglion blocks block nerves to the extremity and stop pain to a great extent. (CX N at 14). Dr. Ozturk testified that RSD is also referred to as complex regional pain syndrome. (CX N at 12). By March 4, 1998, the RSD had extended up Claimant's shoulder and he could not even move it. (CX N at 12-3). He opined that the Claimant's shoulder limitations were related to the RSD from his workplace injury. (CX N at 13). At the time of his deposition, Dr. Ozturk recommended that Claimant get an epidural catheter. He viewed the spinal cord stimulator as an option for the future. (CX N at 22). Dr. Ozturk diagnosed Claimant with second stage RSD, which is characterized by the arm getting cold and the disease spreading beyond the area of onset. (CX N at 23). He opined that the sores on Claimant's arm were caused by the extensive edema in his hand due to the crush injury. (CX N at 23-4). He testified that Claimant's condition was not permanent and that he had not reached maximum medical improvement, but that recovery would be slow. (CX N at 24). He opined that Claimant's left upper extremity was nearly 100 percent impaired based on AMA guidelines and that Claimant could not return to any kind of gainful activity at that time. (CX N at 25-6).

Dr. Ozturk was deposed again on October 7, 1998. (EX 18). He disagreed with Dr. Kleinert's opinion that Claimant does not have RSD. (EX 18 at 5). He stated that a three degree temperature difference between the right and left arm was very significant and indicative of RSD. (EX 18 at 7). He found the Claimant's left hand to be hot, moist, shiny, and ruddy in color. (EX 18 at 7). He also found the nails to be growing faster on the left hand than on the right. (EX 18 at 9). He stated that MRIs never show RSD and that bone scans often do not show RSD. (EX 18 at 27-8).

Dr. Ozturk testified that after the insertion of the spinal stimulator, Claimant could make full use of the range of his shoulder and other parts of his arm, but that this causes him pain. (EX 18 at 12). He stated that Claimant had been encouraged to use his left arm and was surprised that he was not using it more on the surveillance video. (EX 18 at 15). He also testified that Claimant was encouraged to engage in social activities to get his mind off of the pain. (EX 18 at 30).

Dr. Ozturk opined that Ms. McCain's vocational study did not account for the pain that Claimant was experiencing. (EX 18 at 16-17). He said that this would prevent him from concentrating on a job and that it was pain, not movement restrictions, that prevented Claimant from being able to work. (EX 18 at 17). He testified that patients with sympathetic pain can not get their minds off of the pain. (EX 18 at 18).

Dr. Ozturk opined that Claimant had improved and would continue to improve until he would eventually be able to return to work. (EX 18 at 18). He predicted that maximum medical improvement would occur in about a year and that Claimant would then be able to take a job like those listed in Ms. McCain's report. (EX 18 at 21-2). He stated that the spinal cord stimulator prevents Claimant from making sudden movements of the neck, engaging in heavy lifting, and bending the head suddenly. (EX 18 at 20). He testified that the magnet that activates the stimulator can have an adverse effect on computers, TV's, and credit cards and that he hoped it could be removed in a few years. (EX 18 at 35-6). He stated that herpes zoster is not responsible for any of the pain that Claimant is currently experiencing. (EX 18 at 40).

Claimant was admitted for the insertion of his spinal cord stimulator at Cabell Huntington Hospital on April 28, 1998. (CX L at 1). On discharge, he was told to not raise his arms above his head, stretch, twist, bend, lift greater than five pounds, or make any sudden movements. (CX L at 2).

Dr. Arthur Hughes examined Claimant on January 23, 1997. (CX G). He found Claimant to be very cooperative. He found Claimant's left hand to be markedly swollen and slightly colder than his right hand. He noted that Claimant could not abduct or adduct the fingers of his left hand. Claimant's grip on the left side was found to be somewhat weaker than that on the right. Dr. Hughes opined that Claimant had a 10% loss of his arm due to loss of strength, a 20% loss for swelling, and a 30% loss for diminished sensation and pain. These equated to a 60% loss of the arm and a 36% impairment of the whole person. He attributed Claimant's injuries to the crushing of his left hand and the contusion. Dr. Hughes' qualifications are not in the record.

Ms. Sally B. Oxley, a physical therapist, examined Claimant on April 14, 1997. (CX H). Ms. Oxley observed mild edema over the dorsum of Claimant's left hand, but little swelling in his fingers. She told him that the static posturing of the cervical spine and the way he carried his arm at his chest were contributing to his disability. She advised Claimant to be as active as possible with the left upper extremity.

On May 28, 1997, Dr. James H. Rutherford conducted an independent orthopedic medical examination regarding Claimant's crushing injury at work. (CX J). Dr. Rutherford opined that Claimant's symptoms appeared to have worsened over the past six months. He agreed that an RSD diagnosis was probably appropriate. He opined that Claimant could not return to his former employment and was incapable of doing any work of even a sedentary nature. Dr. Rutherford opined that Claimant was temporarily and totally disabled. (CX I). His curriculum vitae is not in the record.

On September 23, 1997, Dr. Bernard Nolan conducted an independent medical examination regarding Claimant's crushing injury at work. (CX K, EX 6). Dr. Nolan observed no muscle atrophy of obvious skin changes in the left upper extremity. He concluded that Claimant lacked about 80% of the normal range of motion in his shoulder, elbow, and wrist. He found that Claimant's symptoms greatly outweighed his physical findings. He opined that Claimant had reached maximum medical improvement and was not capable of returning to his former position. Dr. Nolan is Board Certified in Orthopedic Surgery.

Dr. Bernard Bacevich examined the Claimant on September 22, 1998. (EX 4 at 1). He is Board Certified as an Orthopaedic Surgeon and as an Independent Medical Examiner. (EX 3). He reviewed the medical evidence and examined the Claimant. (EX 4 at 4). He concluded that Claimant did not have symptoms consistent with RSD. He found Claimant's symptoms of weakness to be out of proportion with his injury and opined that Claimant's response to stellate ganglion blocks was inconsistent with RSD. Dr. Bacevich observed no atrophy and observed that Claimant was able to dress himself within about ten seconds. He opined that Claimant had not reached maximum medical improvement. (EX 4 at 7).

Dr. Bacevich submitted an additional report after viewing surveillance video of the Claimant. (EX 4 at 8). He saw Claimant use his left hand to open a van door, support himself on a hand rest, steer with both hands, shift a bag from hand to hand, hold a portable phone, adjust his clothing, and make other movements. (EX 4 at 8). Dr. Bacevich also noted that it was a cold day and Claimant was not wearing a glove on his left hand. He stated that cold temperatures aggravate true RSD. (EX 4 at 9). Dr. Bacevich concluded that Claimant can use his left upper extremity in a normal fashion. (EX 4 at 9). He testified that Claimant had normal use of his arm prior to the insertion of the spinal cord stimulator and that therefore, there were no indications for the procedure. (EX 4 at 10). Dr. Bacevich opined that Claimant was malingering or presenting with a factitious disorder and that he had complete normal usage of his left upper extremity. (EX 4 at 10).

Dr. Bacevich's deposition was taken on October 5, 1998. (EX 5). He testified that he is Board Certified in Orthopedic Medicine. (EX 5 at 5). He based his opinion on an examination, review of medical records, and review of surveillance videotapes. (EX 5 at 8). He concluded that Claimant had no impairment of the upper extremities and did not have RSD. (EX 5 at 8-9). He testified that there was no relation at all between the workplace trauma and Claimant's development of herpes zoster. (EX 5 at 12). He opined that the lack of atrophy in the Claimant's arm meant that he was using the arm in a normal fashion. (EX 5 at 13). Dr. Bacevich testified that the activities that Claimant engaged in during the video surveillance were inconsistent with RSD and the

limitations that he described during his examination. (EX 5 at 17, 19). He also testified that Claimant's experience of only four-and-a-half-hours of relief following nerve blocks was inconsistent with RSD. (EX 5 at 18). At the time of the examination, Dr. Bacevich testified that Claimant had no physical abnormality that resulted in an impairment of his hand. (EX 5 at 20). He testified that the swelling was a permanent condition which caused some enlargement and discoloration, but would not at all impair the function of Claimant's hand. (EX 5 at 20). He also found no impairment to Claimant's left elbow, shoulder, neck, or back. (EX 5 at 21). He opined that the insertion of a spinal stimulator was medically unnecessary. (EX 5 at 47).

Dr. Bacevich opined that Claimant was capable of performing the jobs identified in Ms. McCain's report and that the spinal stimulator and pain medications would not interfere with his performance. (EX 5 at 22). He said that the presence of a spinal cord stimulator would not limit the amount Claimant could lift or his ability to perform overhead work. (EX 5 at 40). He stated that he is not aware of spinal stimulators causing trouble with computers, but that he did not know what type of stimulator Claimant had. (EX 5 at 41). He did not know whether Claimant had to carry a magnet device to activate the stimulator. (EX 5 at 42). He stated that Claimant reached maximum medical improvement on September 23, 1997. (EX 5 at 23). He testified that Claimant needed no continuing medical treatment and that he is capable of working as a machinist for McGinnis. (EX 5 at 24).

Dr. Bacevich stated that his patients with RSD are sensitive to even the lightest touch. (EX 5 at 33). He testified that stellate ganglion blocks are performed by inserting a needle into the side of the neck down to a point adjacent to the spine and that Claimant went through nine of these procedures. (EX 5 at 35). Dr. Bacevich agreed that in many cases, the ability to follow patients clinically over a period of time is an advantage in making findings such as date of maximum medical improvement. (EX 5 at 46).

On June 11, 1997, Dr. Harold E. Kleinert examined Claimant. (CX I, EX 7). He noted that Claimant complained of severe shoulder and arm pain. He observed mild coolness in Claimant's left hand. Claimant's arm appeared to be frozen at the shoulder, elbow, and fingers, but there was no evidence of muscle atrophy. Dr. Kleinert's impression was factitious disorder with symptoms greater than physical findings. He found a differential diagnosis of sympathetic mediated pain, but noted that this was not likely. Dr. Kleinert stated that one of his associates agreed that the disorder was factitious. Claimant was advised to discontinue splinting the arm and start range of motion exercises.

The deposition of Dr. Harold Kleinert was taken on October 8, 1998. (EX 16). He testified that he is Board Certified in General Surgery, Plastic Surgery, and Orthopedic Surgery and that he was

very familiar with RSD. (EX 16 at 5). He based his opinion on an upper body examination on June 5, 1997 in which he found no objective findings that would support a diagnosis of RSD. (EX 16 at 6). Dr. Kleinert opined that Claimant was exaggerating his symptoms. (EX 16 at 7). He stated that if Claimant had the ability to engage in such activities as pumping gasoline, gesturing, and opening truck and van doors, this would be inconsistent with an advanced case of RSD. (EX 16 at 10). He found the bone scan and MRI to be inconsistent with RSD. (EX 16 at 11-12).

In September of 1998, Dr. Kleinert found Claimant to have improved. (EX 16 at 12). Claimant seemed happier and could move his extremity. (EX 16 at 13). He observed new bruising in Claimant's left arm and hand. (EX 16 at 13). He felt that this was due to a subsequent injury, not herpes zoster. (EX 16 at 15). He opined that Claimant's workplace accident did not result in RSD and that Claimant's problem was of a mental nature. (EX 16 at 16-17). He stated that Claimant has a swollen, discolored arm which he uses very poorly and is reluctant to use. (EX 16 at 18).

Dr. Kleinert stated that Claimant should be encouraged to use his left arm and that Mr. Martin's personal physician should determine whether his medication would prevent him from performing light or sedentary work. (EX 16 at 18-19). He opined that pain medication should not be used further and that the spinal stimulator should not be used to the extent that it was prescribed for RSD. (EX 16 at 20). When asked whether Claimant had reached maximum medical improvement on June 5, 1997, Dr. Kleinert pointed out that Claimant wouldn't use his arm when he saw him in June, but was using it in September. (EX 16 at 21). He opined that Claimant may have Munchausen disease or factitious disorder, but that he was not malingering. (EX 16 at 22). He stated that Claimant should see a psychiatrist or psychologist and that if he has factitious disorder, his injuries are likely self-inflicted. (EX 16 at 22, 28). He agreed that Claimant would be unable currently to perform a physical job and that most people with spinal cord stimulators don't do normal work. (EX 16 at 23, 29). He would restrict a patient with a spinal stimulator to much lighter work. (EX 16 at 30). He also agreed that Claimant may feel that he is having pain. (EX 16 at 23).

Vocational Evidence

Janet Pearson testified at the hearing. She works for the State of Kentucky and the Social Security Administration to help people with disabilities return to work. (Tr. 109). She performed an evaluation of Mr. Martin at the request of his attorney. (Tr. 110). She opined that Claimant was incapable of returning to his prior occupation or performing adequately at any other occupation. (Tr. 111). She found that he couldn't return to his job at McGinnis because it required physical exertion, use of bi-manual

dexterity, and heavy lifting. (Tr. 111). With respect to Claimant's inability to obtain alternative employment, Ms. Pearson noted that he cannot use his hands with any frequency, his pain makes concentration difficult, and the magnetic field from his spinal stimulator erases items like credit cards and activates security systems. (Tr. 112). She noted that his medications make him drowsy and he needs to lie down throughout the day. (Tr. 114). Specifically, Ms. Pearson testified that Claimant could not be a security guard, bowling alley attendant, front desk clerk at a hotel, cafeteria worker, census taker, telephone message taker, door tagger, or host. (Tr. 116-7).

Ms. Pearson also submitted a report regarding Claimant's vocational limitations. (CX F). She found that he had acquired no skills at McGinnis which were transferrable to employment requiring less exertion. (CX F at 2). She noted that Claimant reported relief from the spinal cord stimulator, but that he now had pain across his back where the wires were implanted. (CX F at 2). She reviewed reports from Drs. Ozturk, Ibrahim, Rutherford, Kleinert, Nolan, Hughes, and Bhattacharyya. (CX F at 3). She noted good effort across all tested areas in the vocational assessment. (CX F at 3). She concluded that no realistic employment could be identified for Mr. Martin. (CX F at 4). She observed that Mr. Martin did not have the skills to perform low exertional work and lacked bi-manual dexterity. She also observed that high levels of pain and the side effects of pain medication interfere with concentration. She noted that his spinal stimulator would preclude work around computer technology. (CX M at 4). Janet Pearson is a Certified Rehabilitation Counselor and is a Board Certified Vocational Expert. (CX M at 8).

I find her to have been a very credible witness.

Lynn McCain testified at the hearing as well. (Tr. 134). Ms. McCain has a Master's Degree in Rehabilitation Counseling. (Tr. 135). She performed a survey of sedentary to light duty jobs that would be available to someone with no use of his left upper extremity. (Tr. 136). She identified security guard, gate guard, bowling alley attendant, front desk clerk, reservationist, cafeteria worker, census taker, telephone message taker, door tagger, and host positions which were available. (Tr. 137). She stated that Dr. Bacevich indicated to her that Mr. Martin's medications and spinal stimulator would not interfere with his ability to work. (Tr. 140). She testified that based upon her conversation with Dr. Bacevich, it would be appropriate for Claimant to work as a machinist at McGinnis. (Tr. 141).

Ms. McCain never interviewed Mr. Martin. (Tr. 142). She did not review the medical reports of Drs. Bhattacharyya, Ibrahim, Ozturk, Hughes, Rutherford, Kleinert, or Nolan. (Tr. 142-3). She did not review the depositions of Drs. Ibrahim or Ozturk. (Tr. 143). She did not review the notes from Huntingdon Physical

Therapy. (Tr. 143). She performed no vocational or aptitude tests on Claimant. (Tr. 143). Typically, she likes to interview the person for whom she is conducting a labor market survey and review the full body of his medical information. (Tr. 144). She did not raise the issue of the spinal stimulator's magnetic field or Mr. Martin's severe pain with the employers that she spoke to in her labor market survey. (Tr. 144). She did not tell them about the medications that he takes. (Tr. 145). Ms. McCain agreed that Claimant has a significant vocational impairment. (Tr. 145).

Ms. McCain also submitted a labor market survey regarding Claimant's post-injury access to employment. (EX 2). She is a Certified Rehabilitation Counselor. (EX 1). She reviewed the reports from Janet Pearson and Northern Kentucky Technical College in preparing her assessment. (EX 2 at 1). She noted that Claimant had RSD, which affected his left arm and shoulder. (EX 2 at 1). She stated that he complains of sleepiness, irritability, pain to the left arm, and pain across the back at the site of implant. (EX 2 at 1). Ms. McCain conducted her survey assuming Claimant had no use of his left arm. (EX 2 at 2). She identified a number of positions which required only light physical exertion and took consideration of Claimant's inability to use his left upper extremity. (EX 2 at 3-5). Compensation ranged from \$5.15 per hour to \$7.25 per hour for these positions. (EX 2 at 6). Ms. McCain concluded that Mr. Martin had been significantly impacted by his injury and that the greatest barrier to his re-employment may be subjective pain complaints and response to medication. (EX 2 at 6).

I find Lynn McCain to have been a credible witness.

Stipulations

The parties have stipulated and I find that:

1. The Act (33 U.S.C. § 901, et. seq.) applies to this claim.
2. Claimant and Employer were in an employer-employee relationship at the time of the accident/injury.
3. The accident/injury arose out of and in the scope of employment.
4. The accident/injury occurred on September 6, 1995.
5. Employer was advised of or learned of the accident/injury on September 6, 1995.

6. Timely notice of the injury was given the Employer.
7. Employer filed a first Report of Injury (Form LS-202) with the Secretary of Labor on March 6, 1997.
8. Claimant filed a Claim for Compensation (Form LS-203) on February 11, 1997.
9. Claimant filed a timely notice of claim.
10. Employer filed a timely Notice of Controversion (Form LS-207) on March 13, 1997.
11. Disability payments have been made as follow: temporary total disability for a total of \$24,668.49 over 68.71 weeks; non-scheduled permanent partial disability for a total of \$11,831.76 over 72 weeks.
12. All reasonable and necessary medical benefits have been paid by the Employer pursuant to State of Ohio Worker's Compensation.
13. Claimant's "usual employment" consisting of his regular duties at the time of the injury as determined under Section 8(h) of the Act was as follows: Claimant performed repair work on tow boats and barges on the water and dry docks. On occasion, Mr. Martin would do repair work on parts of the tow boat and barges in the machine shop.
14. Claimant has not returned to his usual employment with the Employer since the date of the injury. He worked light duty from October 23, 1995 to December 13, 1995 and from February 6, 1996 through January 22, 1997.
15. Since the date of the accident/injury, the work and earnings record of the Claimant is as follows: light duty for McGinnis from October 23, 1995 to December 12, 1995 for total compensation of \$3,248.00 and February 6, 1996 to January 22, 1997 for total compensation of \$23,528.38.
16. Claimant's average weekly wage at the time of the accident was \$447.86 and his hourly rate was \$12.25, plus overtime at time and a half.

17. For a one-year period immediately prior to the accident/injury, the Claimant was a five-day-per week worker.

(JX1, JX 2, and JX 3).

CONCLUSIONS OF LAW

Nature and Extent of Disability

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. Eckley v. Fibrex and Shipping Co., 21 BRBS 120, 122 (1988); Trask v. Lockheed Shipbuilding and Construction Co., 17 BRBS 56, 59 (1985).

Extent of disability is based on an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, the employee has the initial burden of proving total disability. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. In performing this analysis, I compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988), Mills v. Marine Repair Serv., 21 BRBS 115, on recon., 22 BRBS 335 (1988). At this stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliott v. C & P Tel. Co. 16 BRBS 89 (1984). Usual employment refers to the claimant's regular duties at the time he was injured. Ramirez v. Vessel Jeanee Lou, Inc., 14 BRBS 689 (1982). Thus, even a minor impairment can establish total disability if it prevents the employee from performing his usual employment. Elliott, 16 BRBS at 92 n.4. The claimant's credible complaints of pain alone may be enough to meet his burden. Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989). A doctor's opinion that a claimant's medication would prevent him from performing his usual job can establish a prima facie case. Brown v. Potomac Elec. Power Co., 15 BRBS 337, 339 (1983). Additionally, a psychological injury arising out of a physical injury can support a finding of total disability. Parent v. Duluth, Missabe & Iron Range RY. Co., 7 BRBS 41 (1977).

Once a prima facie case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternative employment. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981), Elliott, 16 BRBS 89. If the employer establishes the existence of such employment, the employee's disability is treated as partial rather than total.

Initially, I compare the Claimant's medical restrictions with the specific requirements of his usual employment to determine if he has established a prima facie case. I find the specific requirements of Mr. Martin's usual employment as a machinist at McGinnis to include climbing ladders with tools, heavy lifting, standing for prolonged periods, using heavy equipment, crawling in confined spaces, kneeling, stooping, using sledgehammers, chain falls, and come alongs.

I find that the opinions of Drs. Sheils, Bolano, Bhattacharyya, Cochran and also Mr. Capito, Ms. Clagg, and Ms. Oxley are not persuasive with respect to this issue. Dr. Cochran, Dr. Sheils, Mr. Capito, Ms. Oxley, and Ms. Clagg did not address Claimant's ability to return to his regular employment. Dr. Bolano's last opinion was dated August 22, 1996. It noted decreased left hand strength, decreased range of motion for the left hand and wrist, decreased lifting tolerance, and increased reports of pain. It is not clear whether Dr. Bolano found these limitations to be sufficient to hinder Mr. Martin in the performance of his regular work. Dr. Bhattacharyya stated that the period of restriction in employment was uncertain. This opinion is vague inasmuch as it indicates neither the severity of Claimant's condition, nor how long it would last.

The opinions of Dr. Ibrahim, Dr. Ozturk, Dr. Hughes, Dr. Rutherford, Dr. Nolan, Dr. Kleinert, Mr. Brewer, and Ms. Pearson support a finding that Claimant is unable to perform his regular work as a machinist at McGinnis. Dr. Hughes found Claimant's left arm to be 60% disabled and his total person to be 36% disabled. Mr. Brewer found Claimant significantly limited by pain in the upper left extremity. I find these impairments to be inconsistent with the ability to perform a physically rigorous job. Dr. Kleinert also opined that Claimant would be unable to perform a physical job. In contrast, the opinions of Dr. Bacevich and Ms. McCain support a finding that Claimant is able to perform his regular job as a machinist for McGinnis.

Dr. Ibrahim's opinion is entitled to additional weight because he is one of Claimant's treating physicians and is a Board Certified physician with special training in hand surgery. Dr. Ozturk's opinion is entitled to additional weight because he is one of Claimant's treating physicians, is Board Certified, and has extensive experience treating RSD. The opinion of Drs. Nolan and Kleinert are entitled to additional weight since they are Board

Certified physicians. Although Mr. Brewer is not a medical doctor, I give additional weight to his opinion since he treated Mr. Martin. I give additional weight to Ms. Pearson's opinion since she is a Board Certified Vocational Expert, gave consideration to all of Claimant's symptomatology, and reviewed most of the available medical evidence. I found the opinions of Drs. Hughes and Rutherford to be well reasoned and worthy of consideration. Additionally, I find that the Claimant's credible testimony supports a finding that he is incapable of performing the heavy physical labor of a machinist at McGinnis.

Dr. Bacevich's opinion is entitled to additional weight since he is a Board Certified physician and personally examined the Claimant. I do not find the opinion of Ms. McCain to be worthy of much weight since she never interviewed Mr. Martin, did not consider the vast majority of the medical reports, and performed no vocational or aptitude tests.

In weighing the evidence, I find that it overwhelmingly favors a finding that Claimant cannot return to his regular work. The vast majority of the medical opinions, as well as the opinions of the most qualified doctors, i.e. those who are both treating physicians and Board Certified support such a finding. These opinions are consistent with Claimant's credible testimony. Additionally, I note that the video surveillance did not show Claimant engaged in any activities which would indicate that he is capable of performing heavy labor. Accordingly, I find that Mr. Martin has proven his prima facie case that he cannot return to his regular employment.

The burden now shifts to the employer to demonstrate the availability of suitable alternative employment. The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-3, 14 BRBS 156, 164-5 (5th Cir. 1981), rev'g 5 BRBS 418 (1977). While the employer need not specifically place the claimant in an actual job, it must establish the precise nature, terms, and availability of the job opportunity. Trans-State Dredging v. Benefits Review Bd. [Tarner], 731 F.2d 199, 200-02 (4th Cir. 1984). The presumption of total disability continues until the employer satisfies this burden.

Ms. McCain has identified a number of light duty jobs in Claimant's geographic area, which she claims are available to someone with no use of his left arm. I must determine whether Claimant is actually capable of performing these jobs. The opinions of Dr. Sheils, Dr. Bhattacharyya, Dr. Cochran, Dr. Hughes, Dr. Nolan, Ms. Clagg, Mr. Capito, Mr. Brewer, and Ms. Oxley do not address whether Claimant is capable of performing light duty jobs

such as those identified in Ms. McCain's report. The opinions of Dr. Ibrahim, Dr. Ozturk, Dr. Rutherford, and Ms. Pearson support a finding that Claimant cannot perform these jobs. The opinions of Dr. Bolano, Dr. Bacevich, Dr. Kleinert, and Ms. McCain support a finding that Claimant can perform these jobs.

The opinions of Drs. Ibrahim and Ozturk are entitled to the greatest weight because these doctors are treating physicians, hold board certifications, and possess experience in treating disorders of the hand. Ms. Pearson's opinion is entitled to additional weight since she is a Board Certified Vocational Expert, gave consideration to all of the Claimant's symptomatology, and reviewed most of the available medical evidence. The opinion of Dr. Rutherford is well reasoned, but not entitled to any special weight. The opinion of Dr. Bolano is entitled to less weight since it was rendered at a time prior to the insertion of the spinal cord stimulator. I find the presence of this magnetic device to be a significant factor in assessing Claimant's ability to secure employment. Similarly, I find that the opinion of Dr. Bacevich is entitled to less weight since he did not know what kind of spinal stimulator Claimant had or whether it required the use of a magnet. The opinion of Ms. McCain is entitled to less weight since she never interviewed Mr. Martin, did not consider the vast majority of the medical reports, performed no vocational or aptitude tests, and did not raise issues about his pain and his spinal stimulator when she interviewed potential employers. I find that Dr. Kleinert's opinion is entitled to additional weight since he is a Board Certified physician. I do not find his opinion as persuasive as those of Drs. Ozturk and Ibrahim however, since these physicians are not only Board Certified, but also have extensive histories as Claimant's treating physicians.

I do not find the surveillance video to be probative of whether Claimant is capable of performing light duty work. Claimant has been told by his doctors and therapists to try and use his hand and arm when possible as a form of therapy. He has also demonstrated his desire to return to work by repeatedly attempting to do so and by agreeing to painful and drastic medical procedures in an effort to improve his condition. The fact that he can use his left upper extremity to perform occasional light tasks does not prove that he is currently capable of returning to regular employment. The videotape cannot display how much pain Claimant is in when he uses his left hand, how badly swollen it is, or how drowsy he is. These are very significant factors in determining his ability to work. Accordingly, when I consider the medical evidence, the surveillance evidence, and the testimony of the Claimant, I find that the employer has not carried its burden of demonstrating the availability of alternative jobs that Claimant is capable of performing. Therefore, I find that Mr. Martin is totally disabled.

Courts have developed two legal standards to determine whether a disability is permanent or temporary in nature and an injured worker's impairment may be found to be permanent under either of the two tests. Eckley v. Fibrex & Shipping Co., 21 BRBS 120, 122-23 (1988). Under the first test, a disability will be considered permanent if the employee's condition reaches the point of maximum medical improvement. James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). Under the second test, a disability will be considered permanent if the impairment has continued for a lengthy period of time and appears to be of a lasting or indefinite duration. Air America, Inc. v. Director, OWCP, 597 F.2d 773, 781-82 (1st Cir. 1979). These two standards, while distinguishable, both define the permanency of a disability in terms of the potential for further recovery from the injury.

Dr. Sheils, Dr. Cochran, Dr. Hughes, Ms. Clagg, Ms. Oxley, Mr. Brewer, and Mr. Capito did not opine on whether Claimant had the potential for further recovery from his injury. The opinions of Drs. Ibrahim, Ozturk, and Rutherford support a finding that Claimant has the potential for further recovery from his injury. Dr. Kleinert testified that when he examined Claimant in June, 1997, his condition had not changed in over two years, but that he hoped Claimant would start using his extremity. I interpret this opinion to express the possibility that Claimant will improve if he starts using his left upper extremity. On January 15, 1996, Dr. Bolano opined that Claimant would reach maximum medical improvement in about three months. On December 16, 1996, Dr. Bhattacharyya opined that Claimant had reached a state of maximum medical improvement. On September 22, 1998, Dr. Bacevich opined that Claimant had not yet reached maximum medical improvement, but on October 5, 1998, he testified that Claimant reached maximum medical improvement on September 23, 1997.

Based on the inconsistency in his opinions, I do not find Dr. Bacevich's opinion credible with respect to this issue. On October 5, 1998 he testified that Claimant was not yet at maximum medical improvement, but less than one month later, he testified that Claimant reached maximum medical improvement a year ago. I also give less weight to Dr. Bolano's opinion since it was rendered on March 30, 1996 and there have been many developments in Mr. Martin's condition since that time. I give less weight to Dr. Bhattacharyya's opinion since it was rendered prior to the insertion of the spinal cord stimulator, which dramatically affected Claimant's condition. I find the opinions of Drs. Ibrahim and Ozturk to be the most credible since these doctors are treating physicians, hold Board Certifications, and have experience in treating injuries to the hand. I find Dr. Rutherford's opinion to be well reasoned, but not due any special weight. Dr. Kleinert's opinion is entitled to additional weight since he is a Board Certified physician. In weighing all of the evidence together, I am most persuaded by the fact that Claimant's two treating physicians, who are also Board Certified, do not believe that he

has reached a state of maximum medical improvement. Accordingly, I find that Claimant's disability is of a temporary nature.

Compensation

Claimant is entitled to temporary total disability benefits under the Act from September 6, 1995 to October 23, 1995; from December 12, 1995 to February 6, 1996; and from January 22, 1997 until he is capable of returning to employment. The benefits awarded must be discounted to reflect those that he has already received under both the Act and state law. 33 U.S.C. § 914(j). Benefits should be calculated based on the stipulated average weekly wage of \$447.86.

Medical Benefits

Section 7(a) of the Act provides that an employer shall furnish medical and surgical treatment for an employee for such period as the nature of the injury or the process of recovery may require. Medical benefits are not compensation and are not time-barred under Section 13 of the Act. See Mayfield v. Atlantic & Gulf Stevedores, 16 BRBS 228, 230 (1984). To be entitled to medical benefits under Section 7, a claimant need not establish that the injury has caused a reduction in wage-earning capacity. Rather, a claimant need only establish that the injury is work-related. See Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 174 (1984). At the time of the hearing, the Employer had paid all reasonable and necessary medical benefits for Claimant's work related injuries. I therefore find that Claimant should continue to receive reimbursement for all reasonable and necessary medical expenses for his injuries arising from the accident of September 6, 1995.

ATTORNEY FEES

On December 8, 1998, Steven C. Schletker, counsel for Claimant, filed a Motion for Employer/Carrier Paid Attorneys Fees. The Certificate of Service indicates that proper service was made on the other parties to this proceeding on that same date. Counsel for the Employer and Carrier will have until April 7, 1999 to respond to the attorney fee petition.

ORDER

Based on the above findings of fact and conclusions of law, I make the following compensation order. The specific computations of the compensation award and interest shall be administratively performed by the District Director.

1. Employer/Carrier shall pay to Claimant temporary total disability for the periods from September 6, 1995 to October 23, 1995; from December 12, 1995 to February 6, 1996; and from January 22, 1997 to the present based upon an average weekly wage of \$447.86, such compensation to be computed in accordance with 33 U.S.C. § 908(b), subject to the limitations at sections 6(b)(1) and 6(b)(2) of the Act, if applicable.
2. Employer/Carrier shall continue to furnish reasonable, appropriate, and necessary medical care for Claimant's work-related injuries, as required by Section 7 of the Act.
3. The Employer/Carrier shall receive credit for all amounts of compensation previously paid to Claimant as a result of his injuries arising from the September 6, 1995 accident. 33 U.S.C.(j).

Rudolf L. Jansen
Administrative Law Judge